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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1038

CITY OF THOUSAND OAKS, CALIFORNIA,
Petitioner,

vs.

VAN NUYS PUBLISHING COMPANY, INC., a Corporation,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Statement of the Real and Only Question.

The "questions presented" in the petition herein do not really or directly arise in this cause; nor were they entertained or decided by the State Supreme Court. One, and only one question arose or was decided; and it is barely, almost casually mentioned in the petition. It dealt with the First Amendment right of free press; specifically, with the right to burden publication and free distribution of a newspaper.

The case deals with a newspaper of general circulation called "Valley News and Valley Green Sheet" which was distributed in Thousand Oaks, California. The trial court expressly found that it was a paper of gen-

eral circulation which carried "local news and intelligence of a general character and political, social, economic and religious information . . . [it] also contains advertising of local interest . . ." It has a circulation of 3500 in Thousand Oaks, all of which is controlled circulation in that the publisher knows where every copy is distributed; some of that circulation is distributed free; the rest of it because of subscription contracts. [See, *Petition*, Appendix B, pp. 21-22.]

So far as the free part of this distribution is concerned, the ordinance here involved requires, as a condition precedent to distribution, that there *first* be obtained the "permission of the owner or of an adult resident or occupant" of the premises to which delivery is made. [See, Thousand Oaks Ordinance, No. 98, sec. 4, *Petition*, pp. 3-4.]

The case in no way involves nor did the State Supreme Court entertain or decide the question of a city's constitutional power to enact a true "anti-littering ordinance." No doubt, the ordinance here involved went beyond publication and distribution of newspapers, and sought to deal with "littering" in the sense of the casting, deposit and scattering of handbills, dodgers, circulars and the like. But, it also dealt, specifically and expressly, with the distribution of newspapers *eo nomine* and imposed a prior restraint upon the free distribution of them. It was only with this express and deterrent application of the ordinance to newspapers that the decision below dealt. The question thus presented—and the only one decided—may be correctly stated in this way:

Is it an abridgement of or a prior restraint upon the First Amendment right of free press for a city to require, as a condition precedent to the free delivery of a newspaper to private premises, that there first be obtained the permission of the owner or of an adult resident or occupation of the premises?

The decision below against an ordinance so broadly phrased as to reach all newspaper distribution, regardless of the distributees' willingness or unwillingness to receive it, not based on any lack of power to prevent or control littering, nor even upon any lack of power reasonably and appropriately to regulate the distribution of media that come within the protection of the First Amendment. The basis of the decision made below was that this particular ordinance, *as applied to newspapers*, was overbroad, since it went further than it had to go to control or regulate littering. The decision is correctly and fully epitomized by this excerpt from the opinion of the State Supreme Court:

> ". . . The city's present broadly phrased, anti-littering ordinance cannot be squared with established First Amendment precepts. Instead of drafting a narrow measure aimed specifically at those who litter or those who handle written materials irresponsibly so as to cause litter, the City of Thousand Oaks has, by the instant enactment, undertaken an extensive interference with the distribution and circulation of all types of written material; as such the challenged provision unquestionably exhibits the familiar unconstitutional vice of 'overbreadth,' proscribing constitutionally protected activity along with 'littering.' . . ." [*Petition*, Appendix A, pp. 1-2.]

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT.

The question really raised is not new, nor has it been decided below in a way "probably not in accord with applicable decisions of this court." [See, Rule 19, 1, *Rules of the Supreme Court*, July 1, 1970.] To the contrary, the State Court's decision cleaves closely to the line of decision that this Court has marked out. The legal problem involved in the case has been often and thoroughly explored by this Court.

First: There is a marked distinction between commercial expression and that which, like a newspaper, is within the protection of the First Amendment. [See, and *cf.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54, and *New York Times v. Sullivan*, 376 U.S. 254, 265-266.] The instant decision observes that distinction. It is only with the deterrent effect of the ordinance upon newspapers—media that are clearly within the protection of the First Amendment [see, *e.g.*, *Greenbelt Co-op. Pub. Assn. v. Bresler*, 398 U.S. 6, 11-12]—that this case deals. Insofar as the ordinance seeks to deal with other media and with what may properly be called "littering," it was left strictly alone by the State Supreme Court.

Second: Freedom of expression is a fundamental right. [*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638.] That does not mean that it is amenable to no regulation; but, it does mean that regulation must be as narrowly confined as is consistent with attainment of some objective in which the State has a compelling interest. It is not enough that there be some rational relation between a legitimate objective and the means of regulation adopted by the State. [See, *e.g.*, *Thomas v. Collins*, 323 U.S. 516, 530;

West Virginia State Board of Education v. Barnette, supra, at 639; *Griswold v. Connecticut,* 391 U.S. 479, 497 (Goldberg J., concurring, joined by Warren, C.J., and Brennan, J.)[1] There must be narrow circumscription of the projected regulation.

Third: Of course, prevention of littering is a legitimate objective; and proscription of indiscriminate casting or throwing away of paper, whether printed or not, has a reasonable relation to that objective. But when the "paper" is of a kind to which the protection of the First Amendment extends, the means of prevention must be so limited as not to abridge the guaranteed right. This Court has made it clear that even when the State may have a compelling interest in preventing some grave abuse "it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuse and without infringing First Amendment rights . . ." [*Sherbert v. Verner,* 374 U.S. 398, 407. See, also: *Louisiana v. N.A.A.C.P.,* 366 U.S. 293, 296-297; *Talley v. California,* 362 U.S. 60, 63; *Schneider v. Irvington,* 308 U.S. 147, 164.]

That demonstration was not and cannot be made in respect of the Thousand Oaks ordinance. This Court itself, in cases like *Martin v. Struthers,* 319 U.S. 141, 148, and *Rowan v. United States Post Office Department,* 397 U.S. 728, 736-737, has pointed out the way to protect the recipient of unwanted publications.

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[1]California has given frequent and obedient application to this principle. [See, *e.g., City of Carmel-by-the-Sea v. Young,* 2 Cal. 3d 259, 268, 466 P. 2d 225, 85 Cal. Rptr. 1; *Weaver v. Jordan,* 64 Cal. 2d 235, 241, 411 P. 2d 289, 49 Cal. Rptr. 537, *cert. den.* 385 U.S. 844; *American Civil Liberties Union v. Board of Education,* 55 Cal. 2d 167, 178-179, 359 P. 2d 45, 10 Cal. Rptr. 647, *cert. den.,* 368 U.S. 819; *Katzev v. County of Los Angeles,* 52 Cal. 2d 360, 366, 341 P. 2d 310.]

without at the same time abridging free press.[2] That way is to proscribe distribution to those who make their unwillingness known.[3] Thus, the way for Thousand Oaks to accomplish its professed anti-littering objective was fully open in a direction that did not involve or require the limitation or suppression of any First Amendment right.

The difference between the way traveled by the Thousand Oaks ordinance and the way suggested by this Court [see, *Martin, supra*, 319 U.S. at 148] and actually adopted by the Congress in an analogous situation [see, *Rowan, supra*, 397 U.S. at 736-737] is, constitutionally speaking, a big one. The ordinance in suit effects a prior restraint by placing advance consent.[4] The other kind of ordinance puts the burden where it belongs—upon the person who does not want the publication. [See, *Martin v. City of Struthers, supra*, 319 U.S. at 148.]

Fourth: Because of the fundamental nature of the right of free press, it cannot be abridged unless there is a clear and present danger of some substantive evil which the State has the right to suppress. [*Dennis v. United States*, 341 U.S. 494, 503-504; *Thomas v. Collins*, 323 U.S. 516, 530; *Schneck v. United States*,

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[2]Freedom to publish, of course, includes freedom to distribute; for the right of publication is of little or no value unless what is published may be distributed or circulated. [See, *Talley v. California, supra*, 362 U.S. at 64; *Lovell v. City of Griffin*, 303 U.S. 444, 452; *Martin v. City of Struthers, supra*, 319 U.S. at 143.]

[3]Such unwillingness can be made known very easily or simply —by a sign or similar notice on the premises, or a statement of unwillingness mailed or otherwise communicated to the publisher.

[4]Having regard to changes in population and occupancy, it is obvious that compliance with the Thousand Oaks ordinance would require the publisher, in effect, to take frequent and repeated censuses of the entire community in which he desires to distribute his newspaper.

294 U.S. 47, 52.] The supposed evil here is "litter," but ". . . . [t]he privilege of [free press] may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . ." [*Martin v. City of Struthers, supra,* 319 U.S. at 143; *cf., Schneider v. Irvington, supra,* 308 U.S. at 162.]

Actually, the danger in the instant circumstances is not clear or present. There will be only one paper at a time left at each premise. The great likelihood is that it will be picked up by the householder in his daily pick-up of his mail or subscription newspaper. Only a few, if any, of the free ones will be left adrift. The clear and present danger of some substantive evil that must be demonstrated must be "of a serious and substantive evil that rises far above public inconvenience, annoyance or unrest . . ." [*Terminello v. Chicago,* 337 U.S. 1, 4; *Cf., Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 509.] Nothing even beginning to approximate an evil of that magnitude was shown in the instant case.

Thus, we see that there is ample precedent from this Court for the decision made by the State Supreme Court. That decision comports with the decisions of this Court upon the subject. And the subject, important though it may be, has been repeatedly and thoroughly explored by this Court. There are other subjects, we deferentially suggest, not yet so comprehensively treated by this Court upon which its limited stock of time might better be spent.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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